(5)

Supreme Court, U.S.
FILED
NOV 12 2002
CLERK

No. 02-563

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., *Petitioners,*

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Brief of Amicus Curiae Life Legal Defense Foundation In Support of Petition for Certiorari

---

CATHERINE W. SHORT
Counsel of Record (admission pending)
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

Attorney for Amicus

27 pp

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of Amicus 1

Introduction 1

I. The Objective "True Threats" Standard Applied by the En Banc Panel Sanctions the Suppression of Constitutionally Protected Speech and an Outright Ban on Certain Forms of Speech 2

A. *The objective test employed by the Ninth Circuit allows the subjects of unwanted speech to dictate the limits of such speech* 2

B. *The objective test based on the "entire context and . . . all the circumstances" is inherently vague and subjective as to the listener's perception of the context and circumstances* 6

C. *The objective test results in quintessential constitutionally protected speech being deemed unlawful and unprotected through events outside the speaker's control* 8

D. *The objective test for true threats exacerbates the already existing imbalance between plaintiffs and defendants in litigation involving political speech* 9

II. The En Banc Panel's Decision Conflicts with this Court's Frequent Iteration that Freedoms of Expression Require Breathing Space to Survive 13

A. *The limits of the so-called "poster pattern" are vague* ... 14

B. *The Ninth Circuit's "analysis" of the threatening nature of the Nuremberg Files website is so obscure that a "reasonable man" could not be expected to understand it* . 17

Conclusion 19

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES:

Cannon v. City and County of Denver, 998 F.2d 867 (10th Cir. 1993) 8

Feminist Women's Health Center v. Blythe, 32 Cal.App.4th 1641 (1995) 10

Florida NOW et al. v. State of Florida, et al., Case No. CL-9911655 AD 3

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 13

NAACP v. Button, 371 U.S. 415 (1963) 1, 13

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) .. 15

N.Y. Times v. Sullivan, 376 U.S. 254 (1964) 12, 13, 19

NOW v. Scheidler, Nos. 01-1118, 01-1119 3

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 15

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). 13

Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus, 14 Cal.App.4th 162 (1993) .. 10

Reali v. Feminist Women's Health Center, 516 U.S. 987 10

Watts v. U.S., 394 U.S. 705 (1969) 19

STATUTORY PROVISIONS:

Alabama Code, Tit. 14, § 350 12

Cal. Code of Civ. Proc. § 1021.5 10

Cal. Elec. Code § 6215.1(b) 5

Cal. Pen. Code § 423 5

Cal. Pen. C. § 13775 5

18 U.S.C. § 248 ..... 2, 6, 11

18 U.S.C. § 1964 ..... 6, 11

I

Interest of Amicus[1]

Life Legal Defense Foundation ("LLDF") is a California non-profit corporation which provides legal assistance to many pro-life individuals who, while not facing judgments as gargantuan as the one handed down in this case, have been and will be chilled by the continual circumscribing of First Amendment rights in the context of anti-abortion advocacy. Even assuming that every such decision has been correct, the effect of drawing a line around anti-abortion advocacy as tightly as the First Amendment might permit, coupled with excessive penalties in the form of damages or attorney fee awards for even touching the line, is devastating.

Freedoms of expression require breathing space. *NAACP v. Button*, 371 U.S. 415, 433 (1963). The antithesis of such breathing space is found in this case, where the line between protected free speech and actionable threats is so unclear that the court splits 6-5 on the issue, but the cost to defendants of guessing wrong which side would prevail runs into tens of millions of dollars.

Introduction

As both the majority and the dissenters agreed, the posters and website at issue in this case contain no threatening language. According to the majority, "the language itself is not what is threatening," but rather "it is the use of the 'wanted'-type format in the context of the poster pattern—poster followed by murder—that constitutes the threat." Pet. App. 39a.[2] However, "[t]he posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a—peaceful, legal—course of action; and they were presented with explicit reference to great moral and political controversies of the past." Pet. App. 75a. Thus, the petitioners' speech "is, on its face, clearly, indubitably, and

---

[1] This brief was not written in whole or part by counsel for any party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Counsel for all parties have consented to the filing of this brief.

[2] References in this brief to the Petition for Writ of Certiorari are designated "Pet." References to the Appendix to the Petition are designated "Pet. App."

quintessentially the kind of communication that is fully protected by the First Amendment." Id.

This Court should grant the Petition in order to determine whether and under what circumstances speech which is "clearly, indubitably, and quintessentially" protected by the First Amendment may be, after the fact, deemed unprotected speech, both proscribable and punishable with monetary damages.

I. The Objective "True Threats" Standard Applied by the En Banc Panel Sanctions the Suppression of Constitutionally Protected Speech and an Outright Ban on Certain Forms of Speech

A. *The objective test employed by the Ninth Circuit allows the subjects of unwanted speech to dictate the limits of such speech*

The definition of "threat of force" employed by the Ninth Circuit in determining whether the petitioners had violated the Freedom of Access to Clinic Entrance Act (FACE), 18 U.S.C. § 248, was "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." Pet. App. 28a.

The Ninth Circuit's test is fatally flawed in the context of speech which is otherwise constitutionally protected. By employing an objective test to the speaker ("a reasonable person would foresee") and a subjective test to the reaction of the subjects of the speech, the Ninth Circuit's test allows the sensibilities of the subjects of speech to dictate the limits of protected speech which is critical of them or their activities.

If the mark of a "true threat" is simply what a reasonable person would foresee would be perceived as a threat by the subject, then the subject can take away the uncertainty by informing all potential speakers of the types and content of speech that he or she perceives as threatening. In the case of abortion providers, they or their spokesmen, such as the National Abortion Federation, National Abortion Rights Action League, and National Organization for Women, could publicly announce that abortion providers perceive all references to "death," "Hell," "guilt" and

"judgment" as threats, as well as many other scriptural references to eternal punishment and the afterlife. Moreover, as abortion providers appear to screen out all references to unborn children from what they hear and see, speech which includes words such as "killing," "murder," "blood," and "pain" are perceived, not as descriptions of what unborn children undergo, but as threats against the providers of these services.

Indeed, such an announcement might well not be a sham. If their public pronouncements are to be believed, abortion advocates do indeed believe that most of what pro-life activists say is threatening and is intended as a threat. For example, Florida National Organization for Women filed a lawsuit opposing the use of the phrase "Choose Life" on license plate frames because it is a "religious motto which has frequently been used to harass, intimidate and at times kill and maim those who seek to exercise their rights, including the right to choose abortion, . . ." *Florida NOW et al. v. State of Florida, et al.*, Case No. CL-9911655 AD, Amended Complaint for Declaratory Judgment and for Temporary and Permanent Injunction at ¶22.[3] Moreover, Florida NOW argued, the "state endorsement of a motto, which appears innocuous but has been used by those who threaten the property, health and the lives of others, represents a clear and present danger to the people of this state." Id. at ¶21. If Florida NOW interprets a "Choose Life" license plate frame as a dangerous incitement to violence and murder, it would undoubtedly interpret the utterance of the phrase "Choose Life" directly to or about a specific abortion provider as a "true threat."[4]

---

[3] Relevant portions of the complaint are included as Appendix A to this brief.

[4] In a case pending before this Court, *NOW v. Scheidler*, Nos. 01-1118, 01-1119, an abortion clinic administrator in Florida testified that she "didn't know how to interpret" a message left for her on the defendant's business card which read "Linda, choose life." She further testified that she could not have reasonably interpreted it to mean that she should stop being involved in the abortion industry and do something else. Tr. at 1488–89. See also, in the same case, Brief of Amicus Curiae Catholic Conference of Illinois, filed in United States Court of Appeal for the Seventh Circuit, at Appendix A-14 (press release from National Organization for Women stating that a prayer vigil led by Francis Cardinal George in front of an abortion clinic was "an act of aggression," and that "900 people marching down the street and stopping in front of a clinic to pray is confrontational").

Florida NOW further argued that the term "Choose Life" is used in order "to demonize those who believe in the right to choose abortion and is meant to infer [sic] that those who disagree with their views do not believe in choosing life but rather choose death. By adopting this terminology, those who oppose abortion have created a climate in which doctors who perform abortions, women who seek abortions, and all those who protect abortion rights are considered murderers and accomplices to murder and are thus fair game and legitimate targets for theft, vandalism, death threats, and murder." Id. at ¶23. In other words, voicing the belief that abortion is the deliberate and wrongful taking of innocent human life is the same as endorsing the killing of abortionists. Clearly, this endorsement could be reasonably interpreted by the listener as a "true threat" if directed at or about a particular abortion provider.

To take another example, the undersigned deposed a Planned Parenthood employee who testified that she considered a defendant's statement "You are part of the culture of death," to be a threat. The phrase "culture of death" was coined by Pope John Paul II to describe the societal acceptance of abortion, euthanasia, and contraception, among other practices. Encyclical letter *Evangelium Vitae*, ¶12. The employee, however, understood the reference to "death" as a threat to herself. Under the Ninth Circuit's ruling, now that the defendant is on notice that this employee so perceives his reference to the "culture of death," his use of that phrase in the future may subject him to civil and criminal sanctions.

The "entire context and . . . all the circumstances" in which anti-abortion beliefs are presently voiced in this country includes abortion providers and advocates continuously affirming and reaffirming each other in their fear that they are at risk of being injured or murdered by fanatical pro-lifers, which to them means virtually all pro-lifers. They have no interest, at least publicly, in assuaging these fears, rather than stoking them. The "entire context" also includes the news media which, through selective reporting, affirm the impression that most, if not all, pro-life advocates are violence-prone fanatics. The "entire context" includes movies, books, and television shows which build story lines around the stereotype of the dangerous, fanatical anti-abortion

zealot. The "entire context" includes legislation based on "findings" that abortion providers are an endangered species in constant danger of violence from fanatical pro-lifers.[5]

This is the "entire context" which, under the Ninth Circuit's objective test, the "reasonable person" must consider before engaging in constitutionally protected speech, in order to avoid words or "formats" which might cause an abortion provider to feel threatened. According to the Ninth Circuit, the test is not whether the speaker intends to convey a threat, but whether the speaker can foresee that the eggshell plaintiff, the abortion provider, will perceive a threat.

Under the Ninth Circuit's test, the subject of criticism, the abortion provider, can dictate the limits of constitutionally protected speech by claiming to perceive a coded threat in facially unthreatening speech, and by communicating that perception to potential speakers. Opponents of abortion will be reduced to such

---

[5] See, e.g., SB 780, enacted 10/14/2001, adding Cal. Pen. Code § 423 et seq. and 13775 et seq., finding that the "level and threat" of "anti-reproductive rights crimes" remained "unacceptably high" and highlighting federal actions to reduce "anti-reproductive rights crimes," virtually all of which pertained to protecting "reproductive health services providers" from violence and threats of violence; also mandating training of police officers on "anti-reproductive rights crimes," in cooperation with "subject matter experts," including "the American College of Obstetricians and Gynecologists, the California Abortion and Reproductive Rights Action League, the California Medical Association, the Feminist Majority Foundation, the National Abortion Federation, the National Organization for Women, and the Planned Parenthood Federation of America." Cal. Pen. C. § 13776.

Another law, AB 797, enacted 9/6/02, amends Cal. Elec. Code § 6215 to allow reproductive health services providers, employees, volunteers, and patients to keep their addresses confidential for purposes of voter registration and service of process. The Act is based on findings that "Persons and groups that oppose reproductive rights attempt to stop the provision of [these] services by threatening reproductive health care service providers, clinic, employees, volunteers, and patients. . . . The threat of violence toward reproductive health care service providers and those who assist them has clearly extended beyond the clinic and into the home. . . . In order to prevent potential [sic] acts of violence from being committed against providers, employees and volunteers . . . it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential." "Reproductive health care services" is defined as "health care services relating to the termination of a pregnancy in a reproductive health services facility." § 6215.1(b).

stirring and imaginative declarations as "Abortion is bad," "Respect life," and "Abortion, along with several other things, is contrary to social justice."

B. *The objective test based on the "entire context and . . . all the circumstances" is inherently vague and subjective as to the listener's perception of the context and circumstances*

As noted in Judge Berzon's dissent, there was some inconsistency in the trial court's instruction to the jury on the objective test for a "true threat" being coupled with the admission of prejudicial evidence concerning the petitioners' views on the justifiable use of force against abortion providers. Pet. App. 107a–08a. Since the test is whether "a reasonable person would have foreseen" how the speech would be perceived by the listener, the subjective views and opinions of these particular petitioners were irrelevant to that determination. Any individual who published the posters, even an outspoken advocate of nonviolence, could be found liable for publishing these alleged "true threats," since any "reasonable person" would have known the reaction of the respondents.

The consequences of this are quite staggering, as abortion opponents have been circulating posters of abortion providers for years. Pet. App 55a. Under the Ninth Circuit's ruling, each of the thousands of posters published after 1994 is a violation of FACE and a predicate act under RICO. Thus, if the Ninth Circuit's ruling is upheld, the individuals who have already published these posters are all RICO defendants-in-waiting, anticipating the knock of the process server at the door to hail them into federal courts across the country.

Once enmeshed in such a suit and assessing whether to fight or fold, these defendants will face myriad questions concerning their actual liability under the test enunciated by the Ninth Circuit. Do the "entire context and . . . circumstances" include what the "victim" of the alleged threat knows, or thinks he knows, about the speaker's beliefs, practices, or history? Is a pro-life speaker responsible for knowing what an abortion provider knows about him (the speaker)? Can a defendant/speaker be held liable because he should have known that an abortion provider believed he (the speaker) has a history of advocating or participating in violence,

even if that belief was in fact mistaken? Even if the speaker made frequent public declarations of his opposition to violence, can he count on those having come to the attention of the abortion provider and becoming part of the "entire context" in which his statement would be interpreted? What if the abortion provider admits that he knew of the speaker's public statements against violence, but says that he didn't believe them?

Further, do the "entire context and . . . all the circumstances" include what the *speaker* knows, but the abortion provider may or may not know? How can the speaker know whether the abortion provider knows "all the circumstances"? For example, in the instant case, the Ninth Circuit held that petitioners should have known that the posters would be perceived as threats, because of the so-called "poster pattern," a pattern of three doctors being killed after their names appeared on "wanted" posters. Pet. App. 39a.[6] However, in setting out the evidence underlying the "poster pattern," the panel relied only on certain facts, while ignoring other facts in the record which undercut the pattern. The most glaring example of this is that one of the three killings occurred during a robbery attempt, with no connection to anti-abortion activity ever established. Pet. App. 55a, Tr. 131, 1197. Another of the killings was committed by someone who had no connection with the making of the poster. Pet. App. 55a. Moreover, there was evidence that posters about hundreds of doctors were in circulation, with no violence being committed against them. Id. Finally, the petitioners had no involvement in making posters about any of the murdered doctors. Id. A "reasonable" speaker, familiar with "the *entire* context and . . . *all* the circumstances," including these, would not foresee that the subject of an anti-abortion poster would perceive it as a threat that he would harm that person. Yet, under the Ninth Circuit's test, the speaker may be held liable if it turns out that the listener was aware of only some of the pertinent facts.

Once again, the objective test shows itself to be highly susceptible to manipulation by those who wish to chill or completely

---

[6] The majority further elaborated that the poster format "*resulted* in the death of three doctors who had also been publicly, yet specifically, targeted." Pet. App. 41a (emphasis added). This extrapolation of a cause-and-effect relationship as if it were an established fact has no support in the record.

silence protected political speech critical of them and their activities. With the assistance of ideological allies and a compliant media, they can ensure that their knowledge of the "context " and "circumstances" in which speech is uttered is selective, with all inconveniently exculpatory facts filtered out.

C. *The objective test results in quintessential constitutionally protected speech being deemed unlawful and unprotected through events outside the speaker's control*

It is instructive to consider the results if the same objective test applied by the Ninth Circuit in the instant case were to be used in the context of defamation. Suppose that, in the course of a year or two, three abortion providers were accused and/or convicted, in separate incidents, of murder for taking the life of a child who survived an abortion procedure. Before, during, and after the time of these events, abortion opponents frequently referred to abortion providers as being engaged in "killing babies" in the context of their abortion practice.[7] After the third doctor is convicted of murder, some abortion providers sue various pro-life speakers for using the term "kills babies," claiming that, under all the facts and circumstances, the term now has a different meaning, and a listener might reasonably interpret this as a statement that the plaintiffs have committed the crime of murdering born children. (To make the analogy more precisely fit the facts of the instant case, the abortion providers would have first heard the particular statements from self-proclaimed experts in libel law, probably lawyers, who inform the abortion providers that the statements are defamatory and that people understand the statements to mean that they are murdering born children. These experts would also be allowed to testify at trial that, based on their expertise, they told the plaintiffs the statements were

---

[7] Cf. *Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993) ("although the words 'killing' or 'murder' are certainly emotionally charged, it is difficult to conceive of a forceful presentation of the anti-abortion viewpoint which would not assert that abortion is the taking of a human life").

defamatory. Such testimony is admitted ostensibly to support the plaintiffs' emotional distress claims.)[8]

If the Ninth Circuit's objective standard were applied, the speakers may very easily be held liable, because "a reasonable person would have foreseen," in light of the pattern of convicted doctors, that a listener would interpret the statement "Dr. X. kills babies" to be a statement that Dr. X is guilty of the crime of murdering born children. Besides punishing the speakers, the decision would put on notice all other speakers that the phrase "kills babies" as applied to abortion providers is presumptively defamatory.

As can be seen from this example, the First Amendment demands a more stringent standard than the objective or negligence standard employed by the Ninth Circuit. Such a standard too easily allows speech that is "clearly, indubitably, and quintessentially" protected by the First Amendment to be deemed unprotected and to subject the speaker to civil and criminal sanctions.

D. *The objective test for true threats exacerbates the already existing imbalance between plaintiffs and defendants in litigation involving political speech*

In his dissent, Judge Kozinski notes that, though the injunction affirmed by the court is a facially more direct prohibition on speech, the crushing liability verdict, which will keep petitioners from rising above poverty level for the rest of their lives, has the greater chilling effect, as it will surely cause "other speakers to hesitate, lest they find themselves at the mercy of a local jury" and similarly "crucified financially." In this regard, he states, the liability verdict is far more damaging than the injunction, because "the latter at least gives notice of what is prohibited and what is not." Pet. App. 68a.

Unfortunately, the laws under which respondents brought their claims ensure that there is no "one free bite" for a speaker. By providing for attorney fee awards to successful claimants, these laws ensure that, even if only injunctive relief were granted, the

---

[8] See Pet. App. 87a–93a (Berzon, J., dissenting) (discussion of admission, over petitioners' objection, of testimony of federal agents concerning their statements to plaintiffs concerning the alleged threatening nature of the posters).

defendants will end up paying a substantial amount in attorney fees, enough to chill them and anyone else who learns of the judgment from engaging in speech which may, after the fact, be deemed unprotected.[9] Ironically, the closer the First Amendment question (as in this case, where the three-judge panel unanimously found the speech protected, and the en banc panel split 6-5 on the issue), the more intensely litigated the case will be, and the more devastating the fee award against the defendant who may be ultimately unsuccessful. The defendant's good faith belief, in conformity with that of several Ninth Circuit judges, that his speech is protected will count for nothing. The plaintiff, meanwhile, can litigate without any such threat. If he loses, he is at most liable for the defendant's costs.

This Court cannot change that statutory imbalance of power. However, this Court can and should proceed as it has done in shaping its First Amendment jurisprudence governing defamation. In that context, it has considered the real-life incentives, deterrents, and resources of various classes of parties engaged in various types of speech. As Judge Berzon noted, this Court has developed "doctrinal protections within defamation law that minimize self-censorship of truthful speech, "which protections "are based upon realistic assessment of the vagaries of litigation

---

[9] See also *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641 (1995), cert. denied, sub nom. *Reali v. Feminist Women's Health Center*, 516 U.S. 987) (awarding attorney fees under "private attorney general" statute (Cal. Code of Civ. Proc. § 1021.5) to abortion clinic and against defendants who unsuccessfully opposed imposition of speech-free zone in front of abortion clinic); *Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal.App.4th 162 (1993) (awarding attorney fees under private attorney general statute to plaintiff abortion clinic, holding that enjoining four defendants enforced important right and conferred substantial benefit on the public because the right to abortion "would be a mere mockery if the courts allowed its individual exercise to be challenged by an organized campaign of intimidation, ridicule, and mockery;" further holding that "the interests of [clinic] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable"). Under the holding in *Aakhus*, any clinic which successfully obtains injunctive relief based on alleged wrongdoing by pro-life speakers is presumptively entitled to an award of fees for having enforced an important right and benefited the public, even if it had a financial stake, because its interests are "mutual and inseparable" from those of its clients. In other words, what's good for an abortion business is good for women and thus good for the public.

and the fear of crippling damages liability." Pet. App. 77a. Rather than a unitary solution, "the balance has been struck with regard to subcategories of defamation, according to the nature of the communication, the nature of the parties, and, to some degree, the purpose of the speech." Pet. App. 78a.

Similarly, this Court can and should, in developing its jurisprudence on "true threats," consider where applicable statutory enactments have already placed the benefits and burdens of civil litigation. Will a speaker on a hotly debated public issue be inclined to push the First Amendment envelope vis-à-vis threats[10] when he can be sued by highly motivated ideological opponents with little to lose?[11] When, if he is found to have engaged in unprotected speech and enjoined from doing so in the future, he will at a minimum have to pay tens or hundreds of thousands of dollars in attorney fees to his opponent, aside from any damages liability? When the law provides for statutory damages, so that a plaintiff need not even show actual damages? See 18 U.S.C. § 248(c)(1)(b). When the law provides for treble damages? See 18 U.S.C. § 1964(c).

It can hardly be disputed that recent decades have seen a shift toward the use of civil litigation as a means of achieving ideological goals. This shift has been accompanied by a systematic accumulation of disincentives to challenging the reigning orthodoxies of the day. Legislative majorities reflecting these orthodoxies gen-

---

[10] Or any other sort of conduct, such as picketing, leafleting, and counseling. This same imbalance of risk and incentive exists as to these activities, which are chilled and hemmed in by statutes and case law which allow an ideological opponent (and target of critical speech) to turn a disputed infraction such as blocking the sidewalk or "interfering with unfettered access" in a driveway into the basis for, e.g., liability under FACE and/or attorney fee awards for defending against "buffer zone" injunctions. See n. 8, supra.

[11] Although theoretically a plaintiff may have to pay his own attorney, as a practical matter, where political causes are involved, the case is likely to be handled pro bono by a private law firm or by a public interest law firm which shares the plaintiff's ideological motives, particularly where the plaintiff is a non-profit corporation such as Planned Parenthood. See e.g. «http://www.fedsoc.org/Publications/Pro Bono/probonosurvey.htm» where Respondent's counsel, Paul, Weiss, Rifkind, Wharton & Garrison, is listed as pro bono counsel in this action. Alternatively, a plaintiff can use the potential for an attorney fee award (with multiplier) to attract counsel on a contingency basis, an incentive not available to defendants seeking representation.

erate laws which favor their constituencies over their opponents in litigation. These laws are interpreted and applied to particular fact situations by judges who may owe their appointments to having supported, or at least not opposed, those same orthodoxies, or whose chances for advancement would be severely hampered if they deviate from the party line—witness the recent bruising Senate confirmation hearings of circuit court nominees who were defeated in committee on the grounds that they are suspected, based on past rulings, of harboring the slightest sympathy for the anti-abortion viewpoint.

The long-term goal of those who challenge the status quo is, of course, to change the status quo by making the political process more cognizant of and responsive to the justice of their claims. In the meantime, however, the out-of-power minority must be able to rely on the *full* protection of the First Amendment to preserve its toehold in the public debate. This is, indeed, the primary function of the First Amendment: to protect the right to be heard of political minorities whose voices could otherwise be silenced by those who currently hold the reins of power.

The availability of FACE, RICO and similar statutes to civil plaintiffs in disputes over political activity already creates a substantial chilling effect on political speech and association, by creating mechanisms for ideological opponents to exact penalties far in excess of what might be expected in a criminal prosecution with all criminal due process safeguards in place.[12] The mere threat of

---

[12] See *N.Y. Times v. Sullivan*, 376 U.S. 254, 277–78 (1964) (citations omitted): "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably, a person charged with violation of this statute enjoys ordinary criminal law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double jeopardy limitation

the litigation itself, necessitating the expenditure of scarce time and resources on defense, exerts a chilling effect. To employ, on top of that, an objective or negligence test for "true threats" under these statutes or their predicate offenses is a heavier burden than First Amendment rights can bear.

II. The En Banc Panel's Decision Conflicts with this Court's Frequent Iteration that Freedoms of Expression Require Breathing Space to Survive

It might be argued that, contrary to the examples raised in Sections I(A) and (C) above of specific words and phrases being deemed unprotected, the Ninth Circuit did not condemn any specific words or phrases, but only a "format" with a particular "style" published in a certain "context." However, this very lack of specificity exacerbates, rather than relieves, the chilling effect of the decision.

This Court has frequently held that freedoms of expression require breathing space to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986). The antithesis of such breathing space is found where the line between protected and unprotected speech, based on "format" and "context" and "style" and "patterns" is vague and imprecise, yet the penalty for being found to have crossed the line is financial ruin. Vagueness in the face of such sanctions will inevitably lead to severe self-censorship and a "pall of fear and timidity . . . upon those who would give voice to public criticism." *N.Y. Times v. Sullivan*, 376 U.S. at 278.

Given that the Ninth Circuit cited the "poster pattern" as the justification for holding that otherwise quintessential protected political speech, uttered in a public forum, was in fact unprotected and sanctionable, one would expect the Court to have clearly and tightly defined what the "poster pattern" consists of. Unfortu-

---

applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. . . . [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

nately, it did not. Indeed, the farther one reads into the decision, the vaguer the parameters of the "poster pattern" become.

A. *The limits of the so-called "poster pattern" are vague*

The Ninth Circuit's definition of a true threat begins "a statement which . . ." What was the "statement" here? Was is that the petitioners were "guilty"? Was it that they were "guilty of crimes against humanity"? Was it the publication of their home addresses? One poster offered a reward for information leading to the revocation of the respondents' medical licenses, while the other exhorted readers to write, picket, or leaflet respondent Crist's home, and offered a reward to anyone who could persuade Crist to turn from child killing. Other than the description of the contents of the posters at the beginning of its decision, the Ninth Circuit never mentioned these portions of the posters, so presumably the finding of the threat was not premised on any of that language. Instead, the Court simply referred in general terms to "'wanted'-style posters."

The Ninth Circuit's holding seems to be that a poster which proclaims an abortion provider "guilty" is a threat, because "guilty" is similar enough to "wanted" and "unwanted" to make such a poster a "'wanted'-style poster." However, the Ninth Circuit's analysis of the crux of the threatening "statement" finds no support in the testimony of the allegedly threatened individuals. These individuals testified that it was being *singled out* which made them feel threatened, and not necessarily by the petitioners or anyone under their control.

The Ninth Circuit's reliance on the "poster pattern" and "'wanted'-style posters" leads to one of three equally absurd conclusions.

A) The Court's "poster pattern" analysis does not apply to any other format in which the same information and opinions might be conveyed. A newspaper ad containing the same text; a radio announcement conveying the same information and making the same pleas; a picket sign with the same information; a billboard-sized rendition of the posters, placed on the side of a truck—none of these would constitute "true threats" because they were not on 8-1/2 by 11" pieces of paper.

B) The Court's analysis *does* apply to the above examples, as long as they contain substantially the same words and information as the posters in this case.

C) The Court's analysis applies to any speech which "singles out" individual abortion providers.

The problem with Conclusion A is that it treats one particular physical expression of ideas and information, an 8-1/2 by 11" piece of paper, as if it were in and of itself a physical weapon or dangerous instrument, which it is not. The respondents themselves, as well as the district court, did not limit themselves to that argument, but cited the discussion of the posters and their contents in editorials as "republications" of the threats. Pet. App. 11a, 135–36a; Tr. 59, 144–45, 962–63, 1069, 1360. Moreover, by holding that the Nuremberg Files listing of the respondents was also a threat, the Ninth Circuit made clear that its holding is not limited to speech printed on a piece of letter-sized paper.

The problem with Conclusion C is that it is a horrendous infringement on the First Amendment. See e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903–04 (1982) (identification and exposure of boycott violators to name-calling and social ostracism was protected speech); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (distribution of "offensive" and "coercive" pamphlets exposing real estate agent's practices was protected speech).

The problem with Conclusion B is that it is will quickly lead to Conclusion C. Just as the Ninth Circuit glossed over the differences between the earlier "wanted" and "unwanted" posters published by others and the "guilty" posters published by the petitioners, so will future plaintiffs argue that any differences between the petitioners' posters and the speech at issue in their case are insignificant compared to the similarities.[13] Indeed, the plaintiffs will probably use the defendants' attempt to differentiate their posters as further evidence against them: "Q: Isn't it true that you deliberately avoided the phrase 'GUILTY of Crimes Against

---

[13] See also the district court's injunction, affirmed by the Ninth Circuit, which prohibits the petitioners from publishing, republishing, or possessing the posters or their "equivalent." Pet. App. 182a.

Humanity' and instead used the words 'REPENT, Dr. Smith, of your blood guilt,' just to avoid liability? You were trying to be just different enough to avoid a lawsuit, weren't you? Your purpose in publishing the posters was the same, was it not?"[14] In short order, any speech which singles out abortion providers, published in any format, could be held to fit the "poster pattern," with the differences brushed aside as mere attempts to . . . be different.

"Could" is the operative word in the last sentence. Whatever might ultimately be held in particular factual contexts to be contained within the "poster pattern," the answer is not dependent on the particular words used, e.g., "wanted" vs. "guilty." As the Ninth Circuit said, "differences in captions or words are immaterial." Pet. App. at 39a. Nor is the format determinative, e.g., poster vs. website vs. republication in newspaper editorials. So speakers must guess as to whether their speech might be held to be similar enough to the poster pattern to constitute a "true threat," and lead to their being found liable for hundreds of thousands or even millions of dollars. In such a climate of uncertainty, the self-censorship of speech about abortion providers will be more thorough than any content-based law could ever impose.

Another undefined element of the "poster pattern" is time, with "true threats" being found to have been published up to two and one-half years after the last killing in the "pattern." Pet. App. 9a–11a.

Will the "poster pattern" ever expire? More importantly, how would a speaker know whether it has expired or not? What criteria would a "reasonable person" use to determine the vitality of the "poster pattern"? In truth, there is no way for a speaker to determine whether one year, two years, five years, ten years, or more will be considered sufficient time since the last incident to avoid the perception of a threat. One person might think six

---

[14] This same scenario could be played out even if the Ninth Circuit had expressly held that the "poster pattern" applied only to actual paper posters. The next plaintiff could easily (and reasonably) argue that a defendant should not escape liability for publishing "true threats" in another format, e.g., a billboard or picket sign, when "a reasonable person would have known" that the plaintiff would understand that the defendant was only using the alternative format to avoid liability, and that, for all intents and purposes, it was as close to a "threatening" poster as he thought could get away with.

months is reasonable; another might think five years precipitous. Since his fate lies with a jury's post hoc determination as to what was "reasonable," the cautious speaker will keep silent.

B. *The Ninth Circuit's "analysis" of the threatening nature of the Nuremberg Files website is so obscure that a "reasonable man" could not be expected to understand it*

The vagueness of the parameters of the "poster pattern" reaches its zenith in the Ninth Circuit's discussion of the Nuremberg Files website. The Court's reasoning here is simply opaque.

In its first discussion of the website, the Ninth Circuit stated only that it could not say "that it is clear as a matter of law that listing [respondents] on *both* the Nuremberg Files *and* the GUILTY posters is purely protected political expression." Thus, the question of whether it was a "true threat" was for the jury. Pet. App. 33a (original emphasis).

In its conclusion, however, the Court stated, "In conjunction with the 'guilty' posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list.[15] To this extent only, the Files are also a true threat." Pet. App. 45a.

The Court's use of somewhat disembodied language in discussing the website and the absence of any discussion of the petitioners' intent or what they "should have known" about the effect of the website on the respondents is explained by the fact that the petitioners were in no way responsible for the respondents

---

[15] As with the posters, the Ninth Circuit considered only some of the "entire context and . . . all the circumstances" concerning the publication of the website. The court singled out as significant to its "threats" analysis the fact that abortionists listed on the site who had been killed or wounded had their names stricken out or highlighted in grey. Pet. App. 33a. From this, the Court concludes that the respondents would feel threatened by being on a "scorecard" or "hit list." Pet. App. 45a. The court completely disregarded the undisputed testimony of Neal Horsley, creator of the website, that, rather than keeping an updated "scorecard," he had, on a single occasion, copied that information and format from a mainstream online news source and incorporated it into the site. Tr. 2282–85. As discussed in Section I(B), supra, under the objective test for threats, the speaker's more complete knowledge of "all the circumstances" apparently is outweighed by the listener's lack of knowledge of "all the circumstances." Under the objective or negligence standard for speakers, perception trumps reality.

being listed on the website. As set out in the Petition for Writ of Certiorari, that was the work of a non-party, Neal Horsley, who owned, operated, and had sole control over the contents of the website. Pet. at 3.[16] Nevertheless, the Ninth Circuit held that the appearance of the respondents' names on the website constituted a "true threat" against them *by the petitioners*. Thus, apparently the parameters of the "poster pattern" extend not only to making the petitioners' constitutionally protected speech unprotected, but to turning the protected speech of others into "true threats" for which the petitioners are responsible, and for which presumably the second speaker, under the objective test, can also be found liable should he be sued.

Note the snowball effect: Some people publish posters about a number of abortion doctors. Three of the doctors are killed, two by people who did not make those posters, or any other posters as far as the record shows. The petitioners publish posters about other doctors, which posters are then held to be unprotected speech because they are too similar to the posters previously published by other people, about other doctors, followed by murders committed by still other people. Then, a website published by yet another person is held to be unprotected speech to the extent it contains names published by the petitioners on posters which were too similar to posters published by other people followed by murders committed by still other people.

If tomorrow someone were to look at the website, see Dr. Hern's name, and then say to him, "Dr. Hern, someday you're going to be put on trial for your crimes against humanity," would that be unprotected speech if Dr. Hern said he felt threatened by it? Who would be liable? The speaker? Neal Horsley, because the speech was made "in conjunction with" his website which had

---

[16] Although the district court purportedly found that Neal Horsley, a non-party, "managed" the Nuremberg Files website as the "agent and co-conspirator" of the petitioners, Pet. App. 177a, the court acknowledged the petitioners' lack of ownership or control over the website by enjoining the petitioners "and their agents" only from "providing additional information" about respondents "to the Nuremberg Files website or any mirror website," or from republishing "personally identifying information" from the website about respondents. Pet. App. 183a. The court did not place any restrictions on the operation of the website, even as to the respondents' "personally identifying information," because it had no jurisdiction over the site or its owner.

been held to be a "true threat" insofar as it listed Dr. Hern? The petitioners, because the speech was made " in conjunction with" the website that was deemed unprotected because it listed names they also listed on their unprotected posters? All of the above?

The place to stop this downward and outward spiral of liability and subversion of First Amendment rights is at the beginning, where the Ninth Circuit applied an erroneous test to the petitioners' speech. The only question should have been: did the petitioners intend their otherwise constitutionally protected speech to be a threat to the respondents? By departing from that question, and entering the thicket of what a "reasonable person would have known" about how speech would be interpreted, the Ninth Circuit has injected a tremendously chilling degree of uncertainty into the exercise of constitutionally protected rights.

Conclusion

This Court has often given voice to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. at 270; *Watts v. U.S.*, 394 U.S. 705, 707–08 (1969). As Judge Berzon indicated in her dissent, it is precisely the cases which present hard facts which test that commitment. Pet. App. 74a, 102a–03a. These cases test not only our commitment to the principle of freedom of expression, but to the principle of personal responsibility for acts both good and bad. This is seen in the protection this Court has held the First Amendment affords even to those who advocate unlawful acts; only those who actually commit unlawful acts may be punished, because they are solely responsible for their actions. In the United States, we do not recognize a crime or tort of "creating a climate of violence" or "contributing to a climate of violence" or "failing to dissociate oneself from violence." People are held responsible for their own actions, not those of others.

The petitioners here did not kill anyone. They did not threaten to kill or harm anyone. They spoke their minds *publicly*, in terms which were "clearly, indubitably, and quintessentially" protected under the First Amendment, on one of the most vital and contentious topics of our day. They cannot be held liable and have

their speech proscribed because "a reasonable person" would have known that the subject of their critical speech would take it as a threat, because of a "context" over which the speakers had no control.

The Court should grant this petition to reaffirm our national commitment to *public* debate on *public* issues that is "uninhibited, robust, and wide-open," rather than chilled and stifled by concern that, down the road, a jury or a bare majority of judges may determine that a reasonable person would have known better than to say that.

Respectfully submitted,

CATHERINE W. SHORT
Counsel of Record (admission pending)
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

Attorney for Amicus

Appendix

[filed December 13, 1999]

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

FLORIDA NATIONAL ORGANIZATION FOR WOMEN, INC., SOUTH PALM BEACH COUNTY CHAPTER NATIONAL ORGANIZATION FOR WOMEN, INC., CONGREGATION L'DOR VA-DOR, REVEREND MATTHEW ANDERSON and CHARLOTTE DANCIU, ESQ.

Plaintiffs,

vs.

STATE OF FLORIDA, ROBERT BUTTERWORTH, in his official capacity as Attorney General for the State of Florida, FRED DICKINSON, in his official capacity as Executive Director of the FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES and the DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES.

Defendants.

CASE NO.: CL-9911655 AD

AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND FOR
TEMPORARY AND PERMANENT INJUNCTION

[. . .]

18. "Choose Life" is a quotation from Deuteronomy, 30:19, which is the 5th book of the Bible. The Bible is considered by certain religious groups, including those who inspired, supported

and sponsored this legislation, as the revealed word of G-d, and/or the sacred text of their religion. As originally used in the book of Deuteronomy, the phrase "Choose Life" had nothing to do with abortion, but has been taken out of context and distorted by some to promote their own particular religious and/or political beliefs surrounding abortion.

19. By enacting this law, the State of Florida not only supports, but also endorses the "Choose Life" motto, which stands to promote a religious and/or political point of view and is not secular in purpose. Alternatively, this motto is so pervasively sectarian that any secular meaning cannot be separated from any sectarian meaning. This millenium [sic] has been characterized by far too many instances of misguided zealots misusing and distorting the Bible in order to further an effort to restrict, limit and deny the basic rights of others. Unfortunately our nation has not been spared from such misguided efforts. This misuse of the Bible prompted those who crafted the laws of this State to create a wall of separation between Church and State, which is now reflected in the Florida Constitution. Plaintiffs, CONGREGATION L'DOR VA-DOR and REVEREND MATTHEW ANDERSON believe it would not enhance but cause harm to religion and our state to begin the new millenium [sic] by co-opting the State of Florida to further misuse the Bible in a misguided effort to discourage women from exercising their basic rights.

20. In addition, with this law the State of Florida supports and endorses a motto which advances religion because of its inherently religious meaning. As previously stated, "Choose Life" originates from the Bible and has been the rallying cry of certain religious organizations in their campaign to limit, restrict and/or eliminate abortion.

21. In addition to its use as a slogan to promote a religious view, the phrase "Choose Life" has also been used as the rallying cry of the so-called Pro-Life movement, which has frequently resorted to illegal, vigilante and at times lethal tactics in their effort to prevent women from exercising their right as Floridians to choose abortion. By placing the motto "Choose Life" on license plates in this state, the State of Florida has chosen to support, promote and give "license" to the ideas and activities of a movement which does not believe in the principle of the separation of

Church and State and which has at times threatened and endangered the life, health and well being of the people of Florida and has often resorted to illegal tactics including theft, vandalism, extortion, death threats, bodily injury and/or murder to accomplish its goals. The slogan "Choose Life" is so intertwined with the so-called Pro-Life movement that the issuance of the "Choose Life" license plate by the State of Florida will create the impression in the minds of the public as well as solid evidence that the State of Florida has been co-opted by the so-called Pro-Life movement, which will further encourage and confer an air of legitimacy to activities which are often illegal and dangerous to the people of Florida. This state endorsement of a motto, which appears innocuous but has been used by those who threaten the property, health and the lives of others, represents a clear and present danger to the people of this state.

22. By creating this license plate, the State of Florida has placed its imprimatur upon a religious motto which has frequently been used to harass, intimidate and at times kill and maim those who seek to exercise their rights, including the right to choose abortion, which is considered one of the most fundamental human rights that a person can possess according to the Supreme Court of Florida.

23. The term "Choose Life" is employed by those who oppose the right of the women of Florida to exercise their right to choose abortion. This slogan is used in order to demonize those who believe in the right to choose abortion and is meant to infer [sic] that those who disagree with their views do not believe in choosing life but rather choose death. By adopting this terminology, those who oppose abortion have created a climate in which doctors who perform abortions, women who seek abortions, and all those who protect abortion rights are considered murderers and accomplices to murder and are thus fair game and legitimate targets for theft, vandalism, death threats, and murder.

[. . .]